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3 **UNITED STATES DISTRICT COURT**
4 **EASTERN DISTRICT OF WASHINGTON**

5
6 **LAURIE A. KAEHLER**

7 Plaintiff,

8 vs.

9 CAROLYN W. COLVIN, Acting
10 Commissioner of Social Security,

11 Defendant.

12 Case No. 12cv221-JPH

13 **ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

14 BEFORE THE COURT are cross-motions for summary judgment. ECF
15 Nos. 17 and 19. Attorney David L. Lybbert represents plaintiff (Kaehter). Special
16 Assistant United States Attorney Jeffrey R. McClain represents defendant
17 (Commissioner). The parties consented to proceed before a magistrate judge. ECF
18 No. 6. After reviewing the administrative record and the briefs filed by the parties,
19 the court **grants** defendant's motion for summary judgment, ECF No. 19.

20 **JURISDICTION**

21 Kaehter protectively applied for supplemental security income (SSI) benefits
22 and disability insurance benefits (DIB) on February 26, 2008, alleging disability

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beginning June 1, 2005 (Tr. 189-96, 197-206). The claims were denied initially and on reconsideration (Tr. 62-65, 67-69, 70-73).

3 Administrative Law Judge (ALJ) George W. Reyes held a hearing December
4 13, 2010. Kaehler and a vocational expert testified (Tr. 37-57). On January 14, 2011,
5 the ALJ issued an unfavorable decision (Tr. 17-28). The Appeals Council denied
6 review April 7, 2012 (Tr. 1-4), making the ALJ's decision final. Kaehler appealed
7 pursuant to 42 U.S.C. §§ 405(g), 1382 on April 26, 2012. ECF No. 1, 5.

STATEMENT OF FACTS

9 The facts have been presented in the administrative hearing transcript, the
10 ALJ's decision and the parties' briefs. They are only briefly summarized here and
11 throughout this order as necessary to explain the Court's decision.

12 Kaehler was 45 years old at onset and 50 at the hearing. She graduated from
13 high school (Tr. 48, 50, 570). She alleges physical and mental limitations (Tr.
14 237).

SEQUENTIAL EVALUATION PROCESS

16 The Social Security Act (the Act) defines disability as the “inability to engage
17 in any substantial gainful activity by reason of any medically determinable physical
18 or mental impairment which can be expected to result in death or which has lasted or
19 can be expected to last for a continuous period of not less than twelve months.” 42
20 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a plaintiff shall

1 be determined to be under a disability only if any impairments are of such severity
2 that a plaintiff is not only unable to do previous work but cannot, considering
3 plaintiff's age, education and work experiences, engage in any other substantial
4 work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A),
5 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and
6 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

7 The Commissioner has established a five-step sequential evaluation process
8 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step
9 one determines if the person is engaged in substantial gainful activities. If so,
10 benefits are denied. 20 C.F.R. §§ 404. 1520(a)(4)(i), 416.920(a)(4)(i). If not, the
11 decision maker proceeds to step two, which determines whether plaintiff has a
12 medially severe impairment or combination of impairments. 20 C.F.R. §§
13 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

14 If plaintiff does not have a severe impairment or combination of impairments,
15 the disability claim is denied. If the impairment is severe, the evaluation proceeds to
16 the third step, which compares plaintiff's impairment with a number of listed
17 impairments acknowledged by the Commissioner to be so severe as to preclude
18 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20
19 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or equals one of the listed
20 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is

1 not one conclusively presumed to be disabling, the evaluation proceeds to the fourth
2 step, which determines whether the impairment prevents plaintiff from performing
3 work which was performed in the past. If a plaintiff is able to perform previous work
4 that plaintiff is deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),
5 416.920(a)(4)(iv). At this step, plaintiff's residual functional capacity (RFC) is
6 considered. If plaintiff cannot perform past relevant work, the fifth and final step in
7 the process determines whether plaintiff is able to perform other work in the national
8 economy in view of plaintiff's residual functional capacity, age, education and past
9 work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v.*
10 *Yuckert*, 482 U.S. 137 (1987).

The initial burden of proof rests upon plaintiff to establish a *prima facie* case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is met once plaintiff establishes that a mental or physical impairment prevents the performance of previous work. The burden then shifts, at step five, to the Commissioner to show that (1) plaintiff can perform other substantial gainful activity and (2) a “significant number of jobs exist in the national economy” which plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

STANDARD OF REVIEW

²⁰ Congress has provided a limited scope of judicial review of a Commissioner's

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1 decision. 42 U.S.C. § 405(g). A Court must uphold a Commissioner's decision,
 2 made through an ALJ, when the determination is not based on legal error and is
 3 supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir.
 4 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). "The [Commissioner's]
 5 determination that a plaintiff is not disabled will be upheld if the findings of fact are
 6 supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir.
 7 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla,
 8 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n 10 (9th Cir. 1975), but less than a
 9 preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-02 (9th Cir. 1989).
 10 Substantial evidence "means such evidence as a reasonable mind might accept as
 11 adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401
 12 (1971)(citations omitted). "[S]uch inferences and conclusions as the [Commissioner]
 13 may reasonably draw from the evidence" will also be upheld. *Mark v. Celebreeze*,
 14 348 F.2d 289, 293 (9th Cir. 1965). On review, the Court considers the record as a
 15 whole, not just the evidence supporting the decision of the Commissioner. *Weetman*
 16 *v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(quoting *Kornock v. Harris*, 648 F.2d 525,
 17 526 (9th Cir. 1980)).

18 It is the role of the trier of fact, not this Court, to resolve conflicts in evidence.
 19 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
 20 interpretation, the Court may not substitute its judgment for that of the

1 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th
2 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be
3 set aside if the proper legal standards were not applied in weighing the evidence and
4 making the decision. *Brawner v. Secretary of Health and Human Services*, 839 F.2d
5 432, 433 (9th Cir. 1987). Thus, if there is substantial evidence to support the
6 administrative findings, or if there is conflicting evidence that will support a finding
7 of either disability or nondisability, the finding of the Commissioner is conclusive.
8 *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

9 ALJ'S FINDINGS

10 ALJ Reyes found Kaehler met the insured status requirements of the Act and
11 her last insured date was September 30, 2009. At step one the ALJ found Kaehler
12 engaged in SGA after onset, until June 2007 (Tr. 19, 216-17). At steps two and
13 three, he found she suffers from fibromyalgia, seizure disorder, general
14 osteoarthritis, sacral radiculopathy, bilateral lower extremity radiculopathy with
15 bilateral L3, L4 and L5 facet syndrome, major depressive disorder, bipolar disorder
16 and anxiety, impairments that are severe but do not meet or medically equal a Listed
17 impairment (Tr. 19-20).

18 The ALJ found Kaehler is able to perform a range of light work (Tr. 22). At
19 step four, relying on the VE, he found Kaehler is able to perform her past relevant
20 work as a housekeeper. Alternatively, at step five, the ALJ relied on the VE's

1 testimony and found, even with an RFC for a range of sedentary work, Kaehler
2 could perform other jobs, such as order clerk and receptionist/information clerk.
3 Accordingly, the ALJ found Kaehler is not disabled as defined by the Act (Tr. 26-
4 28, 50-52).

5 ISSUES

6 Kaehler alleges the ALJ should have found her credible and more limited than
7 he did. She alleges the ALJ failed to properly weigh the medical and lay testimony
8 and failed to further develop the record. The Commissioner responds that the ALJ's
9 findings are factually supported and free of harmful legal error. She asks us to
10 affirm.

11 DISCUSSION

12 A. Credibility

13 Kaehler alleges the ALJ's credibility assessment is flawed. ECF No. 18 at 12-
14 15. The Commissioner answers that the ALJ's determination was supported by clear
15 and convincing reasons and should be affirmed. ECF No. 20 at 5-8.

16 When presented with conflicting medical opinions, the ALJ must determine
17 credibility and resolve the conflict. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d
18 1190, 1195 (9th Cir. 2004)(citation omitted). The ALJ's credibility findings must be
19 supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th
20 Cir. 1990). Absent affirmative evidence of malingering, the ALJ's reasons for

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1 rejecting the claimant's testimony must be "clear and convincing." *Lester v. Chater*,
2 81 F.3d 821, 834 (9th Cir. 1995). "General findings are insufficient: rather the ALJ
3 must identify what testimony is not credible and what evidence undermines the
4 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918
5 (9th Cir. 1993).

6 Kaehler appears to assign error to two of the ALJ's reasons: lack of
7 supporting objective medical evidence and failure to follow prescribed treatment.
8 ECF No. 18 at 6-7, 13-15.

9 The ALJ found Kaehler less than credible because there is a lack of
10 supporting objective evidence. Although lack of medical evidence cannot form the
11 sole basis for discounting allegations, it is a factor the ALJ can consider when
12 analyzing credibility. *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005). Here,
13 Kaehler's EEG and two brain MRIs showed no significant abnormality, despite
14 reportedly frequent seizures, and she reported being taken off of anti-seizure
15 medication by a neurologist in Flagstaff after an MRI showed no seizure activity
16 (Tr. 20, 647, 652-53, 899).

17 Kaehler failed to comply with medical treatment, including taking medication
18 as prescribed, without adequate explanation. The ALJ notes Kaehler reported
19 experiencing 20-30 seizures a day, yet "refuses seizure medication." (Tr. 20, 24,
20 547, 647, 711). She discontinued psychotropic medication even though she admitted

1 it was helping her (Tr. 24, 515, 926, 970, 972, 978, 997). Allegedly extreme physical
2 limitations are contradicted by normal findings on examination, including 5/5
3 muscle strength in all limbs and normal muscle tone and bulk (Tr. 23, 550, 710).
4 Activities such as climbing, exercising three times a week, shopping, living
5 independently, traveling to the east coast, propping up a wooden fence, driving,
6 doing light yard work, caring for two dogs, housekeeping and attending church are
7 wholly inconsistent with allegedly spending much of the day sitting or lying down
8 (Tr. 23-24, 254-55, 258, 269, 271, 358, 572, 568, 754). And Kaehler has made
9 inconsistent statements, such as when she told an examiner she does not drive based
10 on her neurologist's recommendation, but drove herself to the appointment. In April
11 2009 a neighbor also reported Kaehler drives (Tr. 23, 254, 270, 568, 572).

12 The ALJ's reasons are clear, convincing and supported by substantial
13 evidence. *See Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002)
14 (inconsistent statements, inconsistencies between statements and conduct and extent
15 of daily activities are properly considered); *Fair v. Bowen*, 885 F.2d 597, 603 (9th
16 Cir. 1989)(unexplained or inadequately explained failure to follow medical
17 treatment properly considered).

18 The reasons Kaehler offers for re-weighing credibility are not persuasive. The
19 ALJ did not err when he assessed credibility. Even when evidence reasonably
20 supports either confirming or reversing the ALJ's decision, we may not substitute

1 our judgment for that of the ALJ. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir.
2 1999).

3 *B. Evidence of mental limitation*

4 Kaehler alleges the ALJ's residual functional capacity assessment should have
5 included moderate limitations assessed by Gary Reyes, Ph.D., in his 2008 evaluation
6 and adopted by reviewing agency psychologist Mary Downs, Ph.D. ECF No. 18 at
7 6-7, referring to Tr. 578, 579-81 [Dr. Reyes' report is duplicated at Tr. 110-120 and
8 Dr. Downs' at 121- 24.] The Commissioner responds, correctly, that Dr. Downs was
9 the only psychologist who translated checkbox moderate limitations into a narrative
10 assessment that contained specific functional limitations. ECF No. 20 at 9-11,
11 referring to Tr. 581.

12 Dr. Downs translated several assessed moderate limitations into the following
13 specific functional limitations: "able to carry out simple instructions, perform within
14 a schedule, sustain a routine, work with others, and make simple work related
15 decision[s]; able to meet the basic mental demands of competitive, renumerative
16 unskilled [work] on a sustained basis" (Tr. 26, 581). This is consistent with
17 Kaehler's ability to run a cleaning business from 2002 until June 2007, even though
18 onset is alleged as of June 1, 2005 (Tr. 19), and with Dr. Reyes' opinion there is no
19 limitation in social interaction, understanding and memory. He assessed the ability
20 to maintain concentration and persistence as moderately limited (Tr. 24-25, 570,

1 572-76, 578). Kaehler does not detail what other mental limitations follow from
2 assessed moderate limitations. This court rejects any invitation to find that the ALJ
3 failed to account for Kaehler's limitations in some unspecified way. *See Valentine v.*
4 *Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 692, n.2 (9th Cir. 2009).

5 The assessed RFC and corresponding hypothetical mentally limit the worker
6 to "tasks that are not performed in a fast paced production environment." The
7 worker is able to attend and concentrate for two hours during the work day with
8 regular 10-15 minute breaks and a lunch break (Tr. 22, 49-50). The ALJ translated
9 Kaehler's mental limitations into the only concrete restrictions available to him: Dr.
10 Downs' recommended restriction to simple instructions and tasks (Tr. 26, 579-81).
11 This was appropriate. *See e.g., Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1174 (9th
12 Cir. 2008) (an ALJ's assessment of a claimant adequately captures restrictions
13 relating to concentration, persistence, or pace where the assessment is consistent
14 with restrictions identified in the medical testimony)(internal citations omitted).
15 It is also consistent with examining Dr. Linner's opinion Kaehler is able to follow
16 simple instructions (Tr. 548) and generally consistent with treatment provider GAF
17 assessments of 65 in October 2007 and August 2008 (Tr. 522, 553), indicating only
18 mild symptoms or functional difficulties. Moreover, as the Commissioner points out,
19 because the ALJ ultimately found Kaehler is capable of performing her past
20 unskilled work as a housekeeper, error if any is clearly harmless. *Molina v. Astrue*,

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1 674 F.3d 1104, 1115 (9th Cir. 2012)(errors are harmless when they are
2 “inconsequential to the ultimate nondisability determination”).

3 The statement in Kaehler’s opening brief that Dr. Reyes’ August 2008
4 evaluation showed “severe problems with memory and IQ of 84-86,” ECF No. 18 at
5 5, is misleading at best. Dr. Reyes stated Kaehler’s IQ test results are in the low
6 average range (Tr. 573) and she has *no* limitations in understanding and memory
7 (Tr. 578). The ALJ properly weighed the evidence of psychological limitations.

8 *C. Dr. Brady*

9 Kaehler alleges the ALJ should have credited treating doctor Craig Brady,
10 D. O.’s opinion that she is unable to work. ECF No. 18 at 7, citing Tr. 702 (undated)
11 and 866-69 (April 2010) . The Commissioner answers that the ALJ’s reasons for
12 rejecting Dr. Brady’s contradicted opinion are specific and legitimate. ECF No. 20 at
13 12-14.

14 The ALJ rejected Dr. Brady’s contradicted 2010 opinion that Kaehler is only
15 able to, for example, stand less than two hours and frequent lifting is limited to less
16 than ten pounds, because it is inconsistent with his own treatment records. *See e.g.*,
17 Tr. 812-13; 816-21; 826-28; 830; 832, 1009-1012 (well-nourished and well
18 developed in no acute distress). In addition, the ALJ observes the opinion explicitly
19 indicates much of it is based on Kaehler’s subjective complaints (Tr. 25, 866-69).
20 Dr. Brady indicates “patient states,” a number of times, including “patient states that

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1 she can't sit for even 1 hour due to right lower back pain" (Tr. 867). The ALJ was
 2 not required to credit an opinion based on properly rejected unreliable self-reports.
 3 Finally, the ALJ notes the RFC is contradicted by Kaehler's admitted activities and
 4 by normal examination results recorded by other treating and examining doctors (Tr.
 5 25-26, 550, 643, 645, 647, 650, 710, 754, 817-18). The ALJ's reasons are specific,
 6 legitimate and supported by the record. *Bayliss v. Barnhart*, 427 F.3d 1211, 126 (9th
 7 Cir. 2005)(an ALJ may reject any opinion that brief, conclusory and inadequately
 8 supported by clinical findings); *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir.
 9 1995)(opinions based on unreliable self-reports may be discounted).

10 *D. Lay testimony*

11 Kaehler alleges the ALJ inadequately explained "why he chose to ignore
 12 statements of the plaintiff's restrictions as provided by treating sources and family
 13 members" ECF No. 18 at 7, referring to Tr. 262. The referenced lay witness is a
 14 friend of Kaehler's, Clayton Howard. The Commissioner admits the ALJ erred when
 15 he failed to discuss this evidence, but asserts the error is harmless. ECF No. 20 at 14.
 16 Citing *Molina v. Astrue*, 674 F.3d 1101 (9th Cir. 2012), the Commissioner notes the
 17 ALJ's error in failing to discuss lay witness testimony should be held harmless
 18 where "the same evidence the that the ALJ referred to in discrediting the claimant's
 19 claims also discredits the lay witness's claims." *Molina*, 674 F.3d at 1121-22.

20 Here, Mr. Howard's April 2008 letter refers to Kaehler's memory problems

1 (Tr. 262). As the ALJ observed, objective testing in September 2008 revealed
2 normal memory functioning (Tr. 578). Because the same evidence discredits Mr.
3 Howard's claims, the ALJ's error is harmless.

4 *E. Duty to develop the record*

5 Kaehler alleges the ALJ failed adequately develop the record. ECF No. 18 at
6 9, 13. The Commissioner answers that the duty to develop the record is triggered
7 only when the evidence is ambiguous or insufficient to properly evaluate disability.
8 ECF No. 20 at 14-15, citing *Mayes v. Massanari*, 276 F.3d 453, 459-60 99th Cir.
9 2001). The Commissioner is correct. The agency ordered both physical and
10 psychological consultative examinations (Tr. 547-51, 568-78). The record was
11 sufficient to evaluate Kaehler's claim and the record was not ambiguous.

12 *F. Steps four and five*

13 Kaehler alleges the RFC and hypothetical fail to completely and accurately
14 include physical and mental limitations. ECF No. 18 at 15-16. This unhelpfully
15 restates the allegation that the ALJ failed to properly weigh the evidence. As noted,
16 the record fully supports the assessed RFC. Although Kaehler alleges the ALJ
17 should have weighed the evidence differently, the ALJ is responsible for reviewing
18 the evidence and resolving conflicts or ambiguities in testimony. *Magallanes v.*
19 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). It is the role of the trier of fact, not this
20 court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence

1 supports more than one rational interpretation, the Court may not substitute its
2 judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*,
3 749 F.2d 577, 579 (9th Cir. 1984). If there is substantial evidence to support the
4 administrative findings, or if there is conflicting evidence that will support a finding
5 of either disability or nondisability, the finding of the Commissioner is conclusive.
6 *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

7 The ALJ's determinations are supported by the record and free of harmful
8 legal error.

9 **CONCLUSION**

10 After review the Court finds the ALJ's decision is supported by substantial
11 evidence and free of harmful legal error.

12 **IT IS ORDERED:**

13 Defendant's motion for summary judgment, **ECF No. 19**, is **granted**.

14 Plaintiff's motion for summary judgment, ECF No. 17, is denied.

15 The District Court Executive is directed to file this Order, provide copies to
16 counsel, enter judgment in favor of defendant and **CLOSE** the file.

17 DATED this 19th day of August, 2013.

18 S/ James P. Hutton

19 JAMES P. HUTTON
20 UNITED STATES MAGISTRATE JUDGE